

United States District Court
Eastern District of California

Mark A. DuRoss,

Petitioner,

vs.

Scott M. Kernan, Warden,

Respondent.

No. Civ. S 04-0638 DFL PAN P

Findings and Recommendations

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Petitioner, a prisoner without counsel, seeks a writ of habeas corpus. See 28 U.S.C. § 2254. Respondent¹ moves to dismiss upon the ground the petition is untimely. Petitioner opposes.

Petitioner was convicted September 24, 1999. December 27, 2000, the appellate court remanded for the trial court to reduce one felony count to a misdemeanor and to re-sentence petitioner

¹ Scott Kernan is substituted as respondent pursuant to Rule 2(a) of the Rules Governing Section 2254 Proceedings and Rule 25(d) of the Federal Rules of Civil Procedure.

1 accordingly but otherwise affirmed.

2 Petitioner was re-sentenced January 18, 2001.

3 Petitioner filed a petition for review in the California
4 Supreme Court February 1, 2001. That court denied review March
5 14, 2001.

6 Petitioner filed a habeas petition in the trial court June
7 18, 2001. That court denied relief July 24, 2001, upon the
8 ground petitioner failed to state a prima facie case.

9 Petitioner filed a habeas petition in the trial court August
10 29, 2001, and the court denied relief October 26, 2001, upon the
11 ground the petition was second or successive and petitioner
12 failed to state a prima facie case for relief.

13 December 18, 2001, petitioner filed a third habeas petition
14 in the trial court. December 21, 2001, petitioner requested the
15 court "omit" the December 18, 2001 petition. January 4, 2002,
16 the court construed petitioner's request as one for voluntary
17 dismissal and dismissed the petition.

18 June 30, 2003, petitioner filed a fourth petition for a writ
19 of habeas corpus, which the trial court denied July 24, 2003,
20 upon the ground the petition was a "gross abuse of the writ
21 process." The court advised petitioner to seek relief in the
22 appellate court.

23 Petitioner moved for reconsideration September 4, 2003. The
24 court denied the motion September 17, 2003.

25 Petitioner filed in the trial court fifth and sixth
26 petitions for a writ of habeas corpus December 30, 2003. The

1 court denied both January 23, 2004, upon the grounds they were
2 incomprehensible, barred under In re Clark, 21 Cal.Rptr.2d 509,
3 541 (Cal. 1993), failed to state a prima facie case and were a
4 "gross abuse of the writ process." The court advised petitioner
5 to seek relief in the appellate court. February 4, 2004,
6 petitioner moved for reconsideration.

7 March 9, 2004, petitioner filed a petition for a writ of
8 habeas corpus in the appellate court. That court denied relief
9 March 11, 2004.

10 March 30, 2004, petitioner filed his federal petition.

11 April 8, 2004, petitioner filed another petition for a writ
12 of habeas corpus in the trial court. The court denied relief May
13 18, 2004. May 23, 2004, petitioner sought reconsideration, which
14 the court denied June 11, 2004.

15 September 13, 2004, petitioner filed another petition for a
16 writ of habeas corpus in the trial court. The court denied
17 relief October 14, 2004.

18 The trial court denied reconsideration of the fifth and
19 sixth habeas petitions June 11, 2004.

20 A one-year limitation period for seeking federal habeas
21 relief begins to run from the latest of the date the judgment
22 became final on direct review, the date on which a state-created
23 impediment to filing is removed, the date the United States
24 Supreme Court makes a new rule retroactively applicable to cases
25 on collateral review or the date on which the factual predicate
26 of a claim could have been discovered through the exercise of due

1 diligence. 28 U.S.C. § 2244(d)(1). Petitioner's conviction was
2 final June 12, 2001. See Bowen v. Roe, 188 F.3d 1157 (9th Cir.
3 1999) (judgment on direct review becomes final when the 90-day
4 limit for filing a petition for certiorari expires). The
5 limitation period is tolled while a properly filed state post
6 conviction application is pending. 28 U.S.C. § 2244(d)(2).

7 Petitioner had until June 12, 2002, to file in federal court
8 and so unless he is entitled to tolling, his March 30, 2004,
9 federal petition is late.

10 For purposes of tolling, a California petitioner's
11 application is "pending" during the time between the decision of
12 a lower court and the filing of a new petition in a higher court
13 so long as petitioner properly is attempting to exhaust state
14 remedies. Carey v. Saffold, 536 U.S. 214, 223 (2002); Gaston v.
15 Palmer, 387 F.3d 1004, 1016 (9th Cir. 2004) (when a California
16 petitioner pursues relief "as he would in a typical appeal state
17 - i.e., bringing the same claims to the court of first instance,
18 then appealing the denial (or otherwise seeking review) in an
19 expeditious fashion - he will be entitled to interval tolling.").
20 While a petitioner ordinarily will benefit from interval tolling
21 when a court reaches the merits of his habeas application, he
22 will not if his abuse of state court procedures undermines the
23 very purpose of interval tolling, viz., to afford applicants "one
24 full round" of state review to satisfy the federal exhaustion
25 requirement. Gatson, 387 F.3d at 1016; Chavis v. LaMarque, 382
26 F.3d 921, 925 (9th Cir. 2004).

1 The trial court reached the merits of petitioner's first and
2 second petitions filed June 18, 2001, and August 29, 2001, which
3 contained different claims and were filed in quick succession,
4 and permitted petitioner voluntarily to dismiss the December 18,
5 2001, petition, which contained two claims made in the first
6 petition and one made in the second petition. The state court
7 did not find these petitions to be abusive and the delay between
8 them was not undue.

9 Giving petitioner the benefit of construing his first three
10 petitions as "properly filed," a dubious proposition, the
11 limitation period was tolled for 200 days, from June 18, 2001,
12 when petitioner filed his first petition in the trial court until
13 January 4, 2002, when the court permitted voluntary dismissal of
14 the third petition. That left petitioner until December 29,
15 2002, to file a federal petition.

16 Petitioner's subsequent state habeas petitions provide no
17 basis for tolling under 28 U.S.C. § 2244(d)(2) because they were
18 filed after the limitation period expired. See Fergusun v.
19 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (section 2244(d)
20 does not permit re-initiation of the limitation period when it
21 expires before a timely state petition for post-conviction relief
22 was filed).

23 Petitioner's March 30, 2004, federal petition is untimely.

24 Accordingly, respondent's December 10, 2004, motion to
25 dismiss should be granted and this action should be dismissed as
26 untimely.

1 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these
2 findings and recommendations are submitted to the United States
3 District Judge assigned to this case. Within 20 days after being
4 served with these findings and recommendations, petitioner may
5 file written objections. The document should be captioned
6 "Objections to Magistrate Judge's Findings and Recommendations."
7 The district judge may accept, reject, or modify these findings
8 and recommendations in whole or in part.

9 Dated: June 7, 2005.

10 /s/ Peter A. Nowinski

11 PETER A. NOWINSKI
12 Magistrate Judge
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